



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203 and 212

[Docket DARS-2022-0013]

RIN 0750-AL36

Defense Federal Acquisition Regulation Supplement: Prohibition on Award to Contractors That Require Certain Nondisclosure Agreements (DFARS Case 2021-D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021 that prohibits the award of any DoD contracts to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict its employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative of DoD authorized to receive such information.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021-D018, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2021-D018." Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2021-D018" on any attached document.

- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2021-D018 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 703-901-3176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend DFARS subpart 203.9 to implement section 883 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 883 prohibits the award of a DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated

investigative or law enforcement representative within DoD authorized to receive such information. The statute also requires entities to inform their employees of the limitations on confidentiality agreements or other statements. Offerors are required to represent compliance with the statutory restrictions prior to submitting an offer or quote.

The requirements of section 883 closely resemble those provided in section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), which was implemented at Federal Acquisition Regulation (FAR) 3.909, Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements (82 FR 4717, dated January 13, 2017).

Differences between the statutory requirements are negligible; the most notable is that section 743 applies the prohibition to entities who require their employees or contractors to sign the internal confidentiality agreements or statements. Section 883, however, applies the prohibition to entities who require their employees to sign them. Since the prohibition at section 743 applies Governmentwide, DoD is currently complying with section 883 based on the FAR application of section 743 to employees and contractors.

II. Discussion and Analysis

The proposed rule implements section 883 of the NDAA for FY 2021 by utilizing the existing Governmentwide prohibition at FAR subpart 3.9 and clarifies the applicability of Governmentwide

statutory guidance at DFARS 203.900. Section 883 provides DoD-specific statutory guidance that is almost identical to section 743, as implemented Governmentwide in FAR 3.909. Both statutes prohibit the award of a contract using appropriated funds to an entity that requires certain confidentiality agreements or statements. Given that the differences in the prohibitions are negligible and the FAR prohibition already applies to DoD contracts, a separate implementation of section 883 in the DFARS is unnecessary. As a result, the proposed rule will add the statutory citation for section 883 in DFARS 203.900 and update the language needed to ensure contracting officers comply with the applicable sections in FAR subpart 3.9.

FAR 3.909-2(a) provides the representation in the System for Award Management required by section 883(a)(1). The representation refers to Government contracts and Federal departments or agencies, which includes DoD. FAR 3.909-2(b) provides direction to the contracting officer regarding reliance on an offeror's representation, as required in section 883(b).

FAR 3.909-3 prescribes the use of the solicitation provision at 52.203-18, Prohibition on Contracting with Entities That Require Certain Internal Confidentiality Agreements or Statements-Representation, and the contract clause at 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, in all solicitations and contracts except those for a personal services contract with an individual. The contract clause at 52.203-19 requires the

contractor to notify its current employees and subcontractors of these prohibitions and restrictions, fulfilling the requirement at section 883(a)(2).

The proposed rule revises the scope of DFARS subpart 203.9 to reconcile with FAR 3.900. The clause prescription at 203.970 is revised to clarify that DFARS 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, which implements 10 U.S.C. 2409 (redesignated as 10 U.S.C. 4701), is applicable to solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items. The rule makes a conforming change to DFARS 212.301, Solicitation provisions and contract clauses for the acquisition of commercial items. While the clause was always applicable to all solicitations and contracts, the proposed revision is intended to reduce the risk of noncompliance.

III. Applicability to Contracts at or below the Simplified Acquisition Threshold (SAT) and for Commercial Services and Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This proposed rule implements section 883 of the NDAA for FY 2021 (Pub. L. 116-283) but does not create any new solicitation provisions or contract clauses. The rule revises the prescription for DFARS clause 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, which implements 10 U.S.C. 2409, to require use of the clause in contracts valued at or below the simplified acquisition threshold and to

acquisitions of commercial services and commercial products, including COTS items. Therefore, DoD intends to apply the rule to contracts at or below the SAT, and DoD intends to apply the rule to contracts for the acquisition of commercial products including COTS items and for the acquisition of commercial services.

The proposed rule, at DFARS 203.909-3, also prescribes use of FAR solicitation provision 52.203-18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements-Representation, and FAR contract clause 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements. The FAR clause and provision, except for personal services contracts, are already prescribed for use in acquisitions valued at or below the SAT; and the FAR clause 52.203-19 is also prescribed for use in commercial acquisitions.

A. Applicability to Contracts at or below the SAT

41 U.S.C 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and

Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does intend to make that determination. Therefore, this rule will apply at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Services and Commercial Products, Including COTS Items

10 U.S.C. 3452 (previously 10 U.S.C. 2375) exempts contracts and subcontracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it would not be in the best interest of DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 (previously 10 U.S.C. 2533c), or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863 (previously 10 U.S.C. 2533b); or
- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the

acquisition of commercial products (including COTS items) and commercial services; or

- USD(A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial products or commercial services from the applicability of the provision or contract clause requirement.

The statutes implemented in this rule do not impose criminal or civil penalties, do not require purchase pursuant to 10 U.S.C. 4862 or 4863, and do not refer to 10 U.S.C. 3452. Therefore, 10 U.S.C. 2409 will not apply to the acquisition of commercial services or commercial products including COTS items unless a written determination is made. Due to delegations of authority, the Principal Director, DPC is the appropriate authority to make this determination. DoD intends to make a determination to apply this rule and the corresponding statutes (10 U.S.C. 2409 and section 883 of the NDAA for FY 2021) to acquisitions at or below the SAT and for commercial services and commercial products, including COTS items.

C. Determination

DoD is proposing to apply the requirements of 10 U.S.C. 2409 and section 883 of the NDAA for FY 2021 to contracts at or below the SAT and to the acquisition of commercial services and commercial products, including COTS items, because the statutory protections are intended to apply to any employee of a contractor or subcontractor who discloses or may be restricted

from disclosing evidence of waste, fraud, or abuse. The statutes only exempt the application to elements of the intelligence community.

10 U.S.C. 2409 provides contractor employees protection from reprisal for disclosure of waste, fraud, and abuse to designated persons and bodies identified in the statute. An employee of a contractor or subcontractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for such a disclosure. The statute does not apply to elements of the intelligence committee.

Section 883 prohibits the award of any DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict its employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative of DoD authorized to receive such information.

It is not in the best interest of the Federal Government to exempt application of this rule to actions below the SAT or to commercial services and commercial products, including COTS items. An exception for contracts below the SAT and those for commercial services and commercial products, including COTS items, would exclude the majority of the contracts and individuals intended to be protected under the laws, thereby undermining the overarching public policy purpose of the laws.

IV. Expected Impact of the Rule

This proposed rule is not expected to have a significant impact on the public or Government agencies, because the requirements of section 883 have already been implemented Governmentwide at FAR 3.909. DoD-specific implementation of section 883 would duplicate the previous implementation of section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) as implemented Governmentwide in the FAR.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S.

Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule does not implement new requirements on any entities beyond those already published in the FAR. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the DFARS to implement section 883 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 883 prohibits the award of a DoD contract to an entity that requires its employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information.

The objective of the rule is to implement the DoD-specific statute that removes restrictions on the ability of employees to report waste, fraud, or abuse to the appropriate DoD

authorities. The legal basis of the rule is section 883 of the NDAA for FY 2021.

This rule will apply to all small entities that are eligible to receive DoD contracts; however, the requirements of section 883 are already met through the Governmentwide implementation of a previously published prohibition at FAR 3.909 and in the System for Award Management (SAM) representations and certifications. As a result, the 361,000 unique small entities registered in SAM as of January 12, 2021, are already compliant with these requirements and will not be required to take any additional action to comply with the DoD-specific prohibition in section 883.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2021-D018), in correspondence.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203 and 212

Government Procurement

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203 and 212 are proposed to be amended as follows:

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

1. The authority citation for part 203 is revised to read as follows:

Authority: 41 U.S.C 1303 and 48 CFR chapter 1.

2. Revise section 203.900 to read as follows:

203.900 Scope of subpart.

This subpart implements 10 U.S.C. 2409 and section 883 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283).

(a)(i) 10 U.S.C. 2409 provides DoD whistleblower protection policies and procedures for contractor employees. Use sections 203.901 through 203.906 of this subpart in lieu of FAR sections 3.901 through 3.906 to implement 10 U.S.C. 2409.

(ii) 10 U.S.C. 2409 does not apply to any element of the

intelligence community, as defined in 50 U.S.C. 3003(4). Sections 203.901 through 203.906 do not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(A) Relates to an activity or an element of the intelligence community; or

(B) Was discovered during contract or subcontract services provided to an element of the intelligence community.

(c) Section 883 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283) prohibits the award of a DoD contract to contractors that require their employees to sign internal confidentiality agreements or statements that would prohibit or otherwise restrict such employees from lawfully reporting waste, fraud, or abuse related to the performance of a DoD contract to a designated investigative or law enforcement representative within DoD authorized to receive such information.

3. Add sections 203.909 and 203.909-3 to read as follows:

203.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.

203.909-3 Solicitation provision and contract clause.

Use the provision at FAR 52.203-18, Prohibition on Contracting with Entities That Require Certain Internal Confidentiality Agreements or Statements—Representation, and the clause at FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, prescribed at FAR 3.909-3 to implement

section 883 of the National Defense Authorization Act for Fiscal Year 2021.

4. Revise section 203.970 to read as follows:

203.970 Contract clause.

Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

PART 212-ACQUISITION OF COMMERCIAL ITEMS

5. The authority citation for part 212 continues to read as follows:

Authority: 41 U.S.C 1303 and 48 CFR chapter 1.

6. Amend section 212.301 by-

- a. Redesignating paragraphs (f) (i) (C) and (D) as paragraphs (f) (i) (D) and (E); and
- b. Adding a new paragraph (f) (i) (C) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(i) * * *

(C) Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, as prescribed in 203.970, to comply with 10 U.S.C. 2409.

* * * * *